

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Antenna Structure Located at 34° 3' 58" N latitude,) File No.: EB-FIELDSCR-16-00022453
91° 57' 36" W longitude (Pine Bluff, Arkansas) on) ASR: 1042873
Land Owned by Lora Lynn Gaither, Edward)
Wilkerson, and Allen Wilkerson)
)

ORDER TO DISMANTLE TOWER

Adopted: January 27, 2022

Released: January 28, 2022

By the Commission:

I. INTRODUCTION

1. By this action, pursuant to section 303(q) of the Communications Act of 1934, as amended (Act),1 the Commission directs, on a joint and several basis, Lora Lynn Gaither, Edward Wilkerson, and Allen Wilkerson (collectively, the Land Owners) and any other person holding an interest in an antenna structure (Structure) located on real property owned by the Land Owners at 34° 3' 58" North latitude, 91° 57' 36" West longitude in Pine Bluff, Arkansas (Land) to dismantle the Structure because it is not marked or lighted as required by the Act and the Commission's rules, and because the Federal Aviation Administration (FAA) has declared that it is a menace to aviation.

II. BACKGROUND

2. Legal Background. Section 303(q) of the Act gives the Commission authority to require the painting and/or illumination of radio towers if and when, in its judgment, such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.2 That section additionally provides, in pertinent part, that "[i]n the event that [a] tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the administrator of the [FAA] determines that there is a reasonable possibility that it may constitute a menace to air navigation."3 In this context, the Commission has interpreted the term "owner" to include an "individual or entity vested with ownership, equitable ownership, dominion or title to the [tower] structure."4 In cases in which the title holder of an antenna structure does not own the land upon which the structure is built (i.e., the title holder of the structure has leased the land upon which the structure is built), the Commission deems title holder of the structure to be its owner unless and until the land owner acquires possession of the structure, in which case the land

1 47 U.S.C. § 303(q).

2 Id.; see also 47 CFR Part 17.

3 47 U.S.C. § 303(q).

4 Streamlining the Commission's Antenna Structure Clearance Procedure, Report and Order, WT Docket No. 95-5, 11 FCC Rcd 4272, 4295, para. 56 (1995) (Antenna Structure R&O).

owner is deemed to be the “owner” of the structure for purposes of administering and enforcing the requirements of section 303(q) of the Act and the associated FCC regulations.⁵

3. *Factual Background.* To identify the parties currently responsible under section 303(q) of the Act for dismantling and removing the Structure, we provide a brief summary of its construction, use, and abandonment. In 1990, Lee Ann Kleider, the Land Owners’ predecessor-in-interest to the Land, granted an easement (Easement) to Colon Johnston that permitted the latter to construct the Structure after obtaining the requisite Commission and FAA approvals.⁶ Under the terms of the Easement, Johnston was required to pay \$12,000 per year to the owner of the Land.⁷ The Easement states that it runs with the land, “so long as the consideration is paid,” and that the owner of the land can terminate the Easement, with notice, if payments are more than 45 days late.⁸ Also in 1990, Johnston appears to have requested a no hazard determination letter from the FAA.⁹ It seems likely that Johnston constructed the Structure in connection with his acquisition of an unbuilt construction permit for a new FM broadcast station to serve Pine Bluff, Arkansas, which the Commission eventually assigned the call sign KPBF-FM (Station).¹⁰ In 1993, Johnston sold the Station to Pine Bluff Radio, Inc., which subsequently sold it to SEARK Radio, Inc. (SEARK) in 1997.¹¹ In 1998, SEARK registered the Structure with the Commission, and the Structure was designated as ASR 1042873.¹² As stated in its registration, the Structure is required to have a steady-burning obstruction light at the top of the Structure and flashing lights at specified heights of the Structure.¹³

4. On April 29, 2003, SEARK sold the Station and the Structure to M.R.S. Ventures, Inc., (MRS).¹⁴ In connection with that transaction, MRS appears to have failed to notify the Commission that it acquired the Structure, such that SEARK remains the registrant of the Structure in the Commission’s records. In 2011, MRS notified the Media Bureau that many of its stations, including KPBF-FM, had

⁵ *Id.*

⁶ Easement Granted by Lee Ann Kleider to Colon Johnston at 1 (Dec. 8, 1990) (on file in EB-FIELDSCR-16-00022453) (Easement).

⁷ *Id.*

⁸ *Id.*

⁹ The FAA’s determination letter is not available in its obstruction evaluation database. An abstract of Johnston’s request and the FAA’s determination is available at <https://oeaaa.faa.gov/oeaaa/external/searchAction.jsp?action=displayOECCase&oeCaseID=268803&row=0> (last visited June 7, 2021).

¹⁰ See Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC File No. BAPH-19900827GS (filed Aug. 27, 1990); Application for License to Cover, FCC File No. BLH-19911218KC (filed Dec. 18, 1991).

¹¹ Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC File No. BALH-19931112GH (filed Nov. 12, 1993) (Johnston to Pine Bluff Radio, Inc.); Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC File No. BAL-19970103EA (filed Jan. 3, 1997) (Pine Bluff Radio, Inc. to SEARK).

¹² See ASR 1042873.

¹³ *Id.* Because of the Structure’s age, its marking and lighting requirements are specified through “FCC Paragraphs” rather than to chapters of an FAA Advisory Circular, which would be the case for a more modern antenna structure. The FCC Paragraphs applicable to the Structure are 3, 4, 5, and 9. The text of the FCC Paragraphs is available at <https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/antenna-painting-lighting>.

¹⁴ See Application for Consent to Assignment of Broadcast Station Construction Permit or License, FCC File No. BAL-20020403AAN (filed April 3, 2002). According to the Media Bureau’s licensing database, this transaction was approved by the Commission on May 21, 2002, and consummated on April 29, 2003.

been silent for more than 12 months, and that their licenses had therefore expired pursuant to section 312(g) of the Act.¹⁵ Today, neither SEARK nor MRS remain in existence.¹⁶

5. According to the public real property records of Jefferson County, Arkansas, the Land passed from Kleider to “Wilkerson Edward W *et al.*,” in April 1996 and then from “Wilkerson Edward W *et al.*,” to “Gaither Lora Lynn *et al.*,” in 2002.¹⁷ In response to a 2017 Letter of Inquiry from the Enforcement Bureau directed to Gaither, Gaither stated that (a) she jointly owns the Land with Edward Wilkerson and Allen Wilkerson; (b) she has never received any payments for the Easement from its holder; (c) upon her own inquiry to the local electric utility company, electricity to the Structure was disconnected in 2005; and (d) at the time the electricity to the Structure was disconnected, MRS was the account holder with the utility company.¹⁸ In subsequent conversations with Enforcement Bureau personnel, Gaither expressed an interest in quieting title to the Structure and then dismantling it, as the Structure is not maintained and is located near her home. Gaither reports that her efforts to do so have been stymied by her inability to obtain local counsel, who, according to Gaither, are wary of representing her because of their unfamiliarity with the Commission’s regulatory requirements. On July 16, 2021, the Bureau issued a Letter of Inquiry to each of the Land Owners in an attempt to update the record and to confirm that no party was paying the Easement’s fee to any of the Land Owners.¹⁹ To date, none of the Land Owners have responded.

6. The Structure has a height of 114 meters above ground level,²⁰ and the Commission has received complaints that it is not properly lit. There are no other Commission licensees using the Structure for radio transmissions. While the Commission does not know the precise date on which the Structure’s lighting failed, based on complaints the Commission received (and as corroborated by Gaither), the Structure has not been illuminated since at least November 28, 2005. On May 21, 2021, the FAA issued a letter in which it determined that “this abandoned unlit structure [is] a menace to aviation.”²¹ In the 2021 Determination Letter, the FAA recommended that “the FCC take appropriate actions” to ensure that the Structure is dismantled.²²

III. DISCUSSION

7. The material facts in this case are undisputed. The Structure has been unlit for many years, and the FAA has determined that, in its present condition, it constitutes a menace to aviation.²³ The

¹⁵ See Letter from Jerry Russell to Peter H. Doyle, Chief, Audio Division, FCC Media Bureau (Feb. 18, 2011) (on file in EB-FIELDSCR-16-00022453); 47 U.S.C. § 312(g).

¹⁶ Arkansas revoked SEARK’s corporate charter on June 1, 2004. Texas administratively dissolved MRS on December 5, 2008.

¹⁷ See Extract of Land Records of Jefferson County, Arkansas (on file in EB-FIELDSCR-16-00022453); Letter of Inquiry from Charles Cooper, Field Director, FCC Enforcement Bureau, to Lora Lynn Gaither (Apr. 17, 2017) (on file in EB-FIELDSCR-16-00022453).

¹⁸ Response to Letter of Inquiry, from Lora Lynn Gaither to Charles Cooper, Field Director, FCC Enforcement Bureau, at 1 – 2 (May 8, 2017) (on file in EB-FIELDSCR-16-00022453).

¹⁹ Letter of Inquiry from Axel Rodriguez, Field Director, FCC Enforcement Bureau, to Lora Lynn Gaither, Edward Wilkerson, and Allan Wilkerson (Jul. 16, 2021) (on file in EB-FIELDSCR-16-00022453) (2021 LOI). Separate copies of the 2021 LOI were sent to each of Ms. Gaither and Messrs. Wilkerson at the mailing address for the land on which the Structure sits.

²⁰ See ASR 1042873.

²¹ Letter from Steve Phillips, Acting Manager, Obstruction Evaluation Group, to Lora Lynn Gaither, May 21, 2021 (on file in EB-FIELDSCR-16-00022453) (FAA Determination).

²² *Id.*

²³ *Id.*

FAA has also recommended that the Commission take “appropriate actions” to dismantle the Structure.²⁴ A licensee has not used the structure to transmit pursuant to a Commission license in at least a decade,²⁵ and the broadcasters who previously owned the Structure and who registered the Structure no longer exist.²⁶

8. Although the Commission has clear authority to issue an order requiring the dismantlement of the Structure pursuant to section 303(q), it appears that the Structure has been abandoned and lacks any owner of record. As an initial matter, we cannot—and do not—make any findings regarding the legal title to the Structure, which is a matter of Arkansas state law for the courts of that state to resolve. However, because unlit antenna structures pose a significant safety hazard to aviators, their passengers, and the general public, it is important that we identify parties against whom section 303(q) can be invoked to compel the dismantlement of this long-abandoned antenna structure. Gaither has admitted to Enforcement Bureau personnel that she has never received payments under the Easement. Further, the last known holder of the Easement, MRS, was administratively dissolved in 2008, thus making it exceedingly unlikely that Gaither or the Wilkersons continue to receive payments of the fee required under the Easement.²⁷ Thus, pursuant to the terms of the Easement, the Land Owners appear to have the option of taking steps to terminate the Easement.²⁸

9. Because of the threat to life posed by unlit antenna structures that the FAA has determined to be a menace to aviation, we cannot wait for the Land Owners to quiet title to the Easement and foreclose on the Structure before ordering the dismantlement of the Structure. We therefore find that the Land Owners presently possess the Structure for the limited purposes of invoking section 303(q) of the Act and enforcing the Commission’s part 17 rules.²⁹ To guard against the possibility that another party may come forward in the context of a state court action to challenge the termination of the Easement, we also find that any person having a remaining interest in the Structure is subject to this *Order*.³⁰

10. Accordingly, pursuant to section 303(q) of the Act and the Commission’s part 17 rules we direct the Land Owners, jointly and severally, to dismantle the Structure within 90 days following the release of this *Order*, and we extend this direction to any entity that may assert any ownership interest in the Structure.³¹ Upon the release of this *Order*, we direct the Wireless Telecommunications Bureau to update the Antenna Structure’s registration to identify the Land Owners as the new registrants of the structure for purposes of compliance with the Act and part 17 of the Commission’s rules. To the extent that any other entity is deemed by a court of appropriate jurisdiction to hold an interest in the Structure, we direct the Wireless Telecommunications Bureau to add that entity to the registration, and we will hold

²⁴ *Id.*

²⁵ *See supra* para. 4.

²⁶ *Id.*

²⁷ Indeed, in response to the 2017 LOI, Gaither stated that she had never received payments under the Easement. *See supra* paras. 4 - 5.

²⁸ *See* Easement at 1.

²⁹ *See Antenna Structure R&O*, 11 FCC Rcd at 4295, para. 56 (stating that land owners in possession of an antenna structure are treated as the structure’s owner for purposes of the Commission’s part 17 rules).

³⁰ By making persons with interests in the Structure—but not known to the Commission—subject to this *Order*, our intent is not to relieve the Land Owners of the primary obligation to dismantle the Structure; instead, we include unnamed interest holders in order to provide the Land Owners with evidence that could be used in a state court action to quiet title to the Structure or as a defense in the event that an interest holder subsequently comes forward to challenge the Land Owners’ actions in response to this *Order*.

³¹ Within five days following the dismantlement of the Structure, the Land Owners and any other party holding an ownership interest of record in the Structure must file FCC Form 854 with the Commission’s Wireless Telecommunications Bureau. 47 CFR § 17.57.

all registrants jointly and severally liable, along with the currently named Land Owners, for compliance with the section 303(q) obligations relating to the Structure.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED THAT**, pursuant to section 303(q) of the Act, Lora Lynn Gaither, Edward Wilkerson, Allen Wilkerson, and any person holding an ownership interest of record in the Structure, shall, jointly and severally, dismantle the antenna structure located at 34° 3' 58" North latitude, 91° 57' 36" West longitude, and registered with the Commission under ASR 1042873, within 90 days of this *Order*.

12. **IT IS FURTHER ORDERED THAT** a copy of this *Order* is sent to the Land Owners at their respective addresses of record.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary